Nasharuddin bin Nasir v Kerajaan Malaysia & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–11–2002
SURIYADI J
8 NOVEMBER 2002

Criminal Procedure *— Habeas corpus — Extension of detention order — Whether s 73(1) of the Internal Security Act 1960 requires an application of the mind on the part of Inspector, Assistant Superintendent, Deputy Superintendent, designated officer or Inspector-General when authorizing an extension — Whether respondents gave sufficient reasons for the extension — Whether respondents specifically identified the reason for extension — Internal Security Act 1960 s 73(1) and (3)*

Criminal Procedure *— Habeas corpus — Application for — Test to be applied — Objective test*

The applicant was arrested by a police officer under s 73(1) of the Internal Security Act 1960 ('the Act'), followed in its wake on 12 June 2002 by a s 8 detention order. The second respondent had signed that order ('the order'). The applicant had filed an action, among others, praying for the right of access by his counsel and the substantive order of habeas corpus. After hearing both parties, the court had concluded that as the applicant had successfully proved that the police had indeed acted in a mala fide manner, the applicant thus was entitled to meet his solicitors, to pave the way for them to discharge their duties effectively. The present application was for the substantive order of habeas corpus.

Held, allowing the application:

(1) Inspector, Assistant Superintendent, Deputy Superintendent, designated officer or Inspector-General ('senior officers') must be in possession of the reasons as provided for under s 73(1)(a) and (b) of the Act before authorizing the extensions of detention orders. To mechanically extend the detention periods provided for by their respective powers, without applying their minds would certainly militate against the tenets of habeas corpus law. The opening words of 'may be detained' rather than 'shall be detained' under s 73(3) of the Act, fortified this view in that it endows the relevant officers with discretion, which requires the application of the mind, whether to authorize the extension or otherwise (see p 623F–H).

(2) To import unrelated factors when extending that detention order would surely prejudice the interest of the detainee. It could certainly be implied that due to the insufficiency of reasons, unrelated matters necessitated importation by the respondents, to justify the further detention. The power to authorize any

extension was statutorily designed with s 8 of the Act in mind, and the inclusion of unrelated matters would certainly be beyond their jurisdictional powers. That being so, with the premises of the respondents not falling squarely within the scope of s 73(3) of the Act, their exercise of the authority to extend the detentions were flawed at the outset (see pp 625I–626B).

(3) The respondents failed to identify specifically the purpose of the extension. Even though the language of s 73 of the Act was not set out in full in the authorization document but enough on its own to taint the impugned order, the failure to identify the specific purpose of the extension had exacerbated matters for the respondents. Here either the officers had mechanically signed the authorization document to extend the detention period pursuant to their powers, or an unpardonable mistake but not rectified, had been committed. Whichever way one looks at it, the benefit of the doubt must tilt in favour of the applicant, as any detention not in accordance with the law must be struck down (see p 626B, D–F).

(4) Without any particulars disclosed indicating that the applicant had acted or about to act or was likely to act in any manner prejudicial to the security of Malaysia etc, the court could only conclude that the respondents had not discharged the requirements of s 73(1) of the Act. With the failure of the respondents to evidentially prove that the objective test had been applied, the respondents have fallen short of the current legal requirement (see pp 627H–628A); *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449 followed.

[Bahasa Malaysia summary

Pemohon ditangkap oleh seorang pegawai polis di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('Akta tersebut'), yang disusuli dengan satu perintah tahanan di bawah s 8 pada 12 Jun 2002. Responden kedua telah menandatangani perintah tersebut ('perintah tersebut'). Pemohon telah memfail satu tindakan, antara lain, memohon hak akses oleh peguamnya dan perintah substantif habeas corpus. Selepas mendengar kedua-dua pihak, mahkamah telah membuat kesimpulan bahawa oleh kerana pemohon telah berjaya membukti bahawa pihak polis memang telah bertindak dalam cara mala fide, justeru itu pemohon berhak menemui peguamcaranya, membuka jalan untuk mereka melaksana tugas mereka secara berkesan. Permohonan ini adalah untuk perintah substantif habeas corpus.

Diputuskan, membenarkan permohonan:

(1) Inspektor, Penolong Superintenden, Timbalan Superintenden, pegawai atau Ketua Inspektor ('pegawai kanan') yang dipilih

A mesti memiliki alasan seperti yang diperuntukkan di bawah s 73(1)(a) dan (b) Akta tersebut sebelum meluluskan perlanjutan perintah tahanan. Untuk melanjutkan tempoh tahanan yang diperuntukkan oleh kuasa masing-masing secara mekanikal, tanpa pemakaian minda mereka sudah tentu bertentangan dengan prinsip undang-undang habeas corpus law. Perkataan pembuka 'may be detained' dan bukan 'shall be detained' di bawah s 73(3) Akta tersebut, memperkukuhkan pandangan ini dalam ertikata ia mengurniakan pegawai-pegawai yang relevan dengan budi bicara, yang menghendaki pemakaian minda, sama ada untuk meluluskan perlanjutan atau sebaliknya (lihat ms 623F–H).

(2) Untuk memasukkan faktor-faktor yang tidak berkaitan sewaktu melanjutkan perintah tahanan sudah pasti akan memudaratkan kepentingan orang yang ditahan. Ia pastinya boleh disiratkan bahawa disebabkan kekurangan alasan-alasan, perkara-perkara yang tidak berkaitan telah dimasukkan oleh responden-responden untuk menjustifikasikan tahanan lanjut. Kuasa untuk meluluskan perlanjutan digubah dengan mengambilkira s 8 Akta tersebut, dan kemasukan perkara yang tidak berkaitan sudah tentu melampaui bidang kuasa mereka. Memandangkan demikian, dengan premis responden-responden tidak dirangkumi secara terang-terangan dalam lingkungan s 73(3) Akta tersebut, pelaksanaan kuasa oleh mereka untuk melanjutkan tahanan tidak sempurna sejak mula lagi (lihat ms 625I–626B).

(3) Responden-responden gagal mengenal pasti tujuan perlanjutan secara khusus. Walaupun bahasa s 73 Akta tersebut tidak dinyatakan secara penuh dalam dokumen kuasa tetapi dengan sendirinya cukup untuk mencemar perintah yang dipersoalkan, kegagalan untuk mengenal pasti tujuan khusus perlanjutan telah memburukkan keadaan untuk responden-responden. Di sini sama ada para pegawai telah menandatangani dokumen secara mekanikal untuk melanjutkan tempoh tahanan menurut kuasa mereka, ataupun satu kesilapan yang tidak boleh dimaafkan tetapi tidak dibetulkan, telah berlaku. Walau bagaimanapun ia diteliti, manfaat keraguan mestilah cenderung terhadap pemohon, kerana apa-apa tahanan yang tidak menurut undang-undang mestilah dibatalkan (lihat ms 626B, D–F).

(4) Tanpa apa-apa butir didedahkan yang menunjuk bahawa pemohon telah bertindak atau mungkin bertindak dalam apa-apa cara yang memudaratkan keselamatan Malaysia dan lain-lain, mahkamah hanya boleh mencapai kesimpulan bahawa responden-responden tidak melepaskan keperluan s 73(1) Akta tersebut. Dengan kegagalan responden-responden untuk membuktikan melalui keterangan bahawa ujian objektif telah dipakai, responden-responden tidak mencapai keperluan undang-undang semasa (lihat ms 627H–628A); *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449 diikut.]

Notes

For cases on extension of detention order, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1759.

Cases referred to

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156 (refd)

Mohamed Ezam bin Mohd Noor v Ketua Polis Negara and other appeals [2002] 4 MLJ 449 (folld)

Mohamed Ezam Mohd Noor & Ors v Inspector General of Police [2001] 2 MLJ 481 (refd)

Nasharuddin bin Nasir v Kerajaan Malaysia & Ors [2002] 6 MLJ 65 (refd)

Nik Adli bin Nik Abdul Aziz v Ketua Polis Negara [2001] 4 MLJ 598 (refd)

PP v Koh Yoke Koon [1988] 2 MLJ 301 (refd)

Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor [1990] 1 MLJ 171 (refd)

Tan Sri Raja Khalid bin Raja Harun, Re; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 (refd)

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293 (refd)

Legislation referred to

Criminal Procedure Code s 366

Federal Constitution art 151(3)

Internal Security Act 1960 ss 8, 16, 73(1)(a), (b), (2), (3), Chap 11, Pts II, IV

Kamaluddin Mohd Said (Senior Federal Counsel, Ministry of Home Affairs).

Sivarasa (*Ranjit Singh* and *KY Ho* with him) (*Saiful Kasri & Assoc*) for the applicant.

Suriyadi J: On 16 April 2002, the applicant was arrested by a police officer under s 73(1) of the Internal Security Act 1960 ('the Act'), followed in its wake on 12 June 2002 by a s 8 detention order. The second respondent had signed that order ('the impugned order'). Departing from the norm, before the minister had issued the impugned order, the applicant had filed an action, among others, praying for the right of access by his counsel and the substantive order of habeas corpus. Due to the exigencies of the moment, parties had agreed at the outset that the former prayer was to be dealt with first, followed at the appropriate time by the habeas corpus application. After hearing both parties, I had concluded that as the applicant had successfully proved that the police had indeed acted in a mala fide manner, the applicant, thus, was entitled to meet his solicitors, to pave the way for them to discharge their duties effectively (see *Nasharuddin bin Nasir v*

Kerajaan Malaysia & Ors [2002] 6 MLJ 65). For easy reference, I will refer to that pronouncement as 'the first order'.

On 1 November 2002, the sequel to the above application was canvassed before me. This time, for the unfinished business of the habeas corpus application. Before proceeding with the hearing, in no uncertain term, I had posed the question to the learned senior federal counsel whether he objected to my hearing of the application, bearing in mind that I had formulated certain strong views previously. It was necessary, as at the back of my mind, I was conscious that there was every possibility of those views being a cause for concern for the respondents, and a possible ground of appeal by either party. The respondents could allege that with those views breathing behind their backs, they would thus have an additional burden to surmount in the course of the hearing. The applicant could likewise allege that, as I had found the police to have misbehaved, the natural thing for me to do was to issue the habeas corpus order. The fact that the impugned order was founded on that original arrest, as the applicant was never released and rearrested, was of no help either to my fears. Despite his initial hesitancy, he finally acceded to my presiding over the case. Hence, this judgment.

To clear the air, I must state at the outset that even though the first order was not in favour of the respondents, it does not necessarily follow that a habeas corpus order must follow in its wake. This is so as it cannot be said that that questionable behavior of the police on its own was sufficient to render the legal status of the detention unlawful. I take solace from the views of Siti Norma Yaakob FCJ in *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449 where her Ladyship at p 517 opined:

> A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art 5(3) will not have the effect of rendering his detention unlawful and that habeas corpus is not the proper remedy. It would be otherwise if for example, there has been a failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of art 5(3) and such failure would render his subsequent detention unlawful. Clearly, it is the legal status of the detention that determines whether habeas corpus can issue to secure the freedom of a detained person as guaranteed by art 5(2) of our Constitution.

After I had meted down the first order, sometime on 6 September 2002, the law of habeas corpus saw a radical shift on certain legal aspect, resulting in my appreciation of the law having to be overhauled and streamlined, so as to be in tandem with changing times. The case that resulted in those significant changes, and which by necessity require some serious comment is *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449. Suffice if I merely summarize below, the relevant portion that has undergone changes, and which may affect the outcome of the current case, viz:

(1) In the exercise of discretion under s 73(1) of the Act, the objective test is the order of the day, with that application of discretion being

reviewable by a court of law. The subjective test thus now has been relegated to the recycle bin.

(2) Under certain circumstances ss 73(1) and 8 of the Act may operate independently of each other, and as such they cannot be said to be 'inextricably connected', thus departing from the cases of *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 and *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293.

(3) The subjective test which applies to the minister when signing any s 8 order remains intact according to Steve Shim CJ (Sabah & Sarawak).

(4) The provisions of s 16 of the Act are expressly applicable only in relation to Chap 11, Part II of the Act and does not apply to s 73, which falls under Part IV.

(5) In relation to s 73(1)(a), the grounds of detention are not barred from disclosure to the detainee as opposed to the facts, upon which the detention order is based pursuant to cl (3) of art 151 of the Constitution. The grounds to be given by the detaining authority need merely consist of general information and not the evidential details, more relevant to allegations of fact. For purposes of judicial review, and in the context of this issue, there is no constitutional provision around that prohibits disclosure of information concerning matters of national security to the courts. Only the detainee is barred from that information.

I now proceed with the legal dissertation, and for purposes of easy reference, herewith reproduce s 73(1). It reads:

> (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —
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> (a) that there are grounds which would justify his detention under section 8; and
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> (b) that he has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof (hereinafter referred to as 'the specific purpose').

In a gist, for an arrest and detention of a person without warrant to be effective under the abovementioned provision, that exercise must be pursuant to pending enquiries, coupled with that arresting police officer having reasons to believe that there are grounds which would justify that arrested person's detention under s 8, and that the latter has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof ('the specific purpose').

If I may side track slightly, under s 8 (for purposes of this poser, to be read together with s 73(1)(a)) the minister's order is issued deliberately with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. It may thus be construed that that order by the minister is

preventive and ingrained with a futuristic consideration in mind. Section 8 reads:

> (1) If the Minister is satisfied that the detention of any person is necessary with *a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof*, he may make an order (hereinafter referred to as 'the detention order') directing that that person be detained for a period not exceeding two years.

Section 73(1)(b) on the other hand provides that the arresting officer, inter alia, must have reasons to believe that that detainee has 'acted ... in a manner prejudicial to the security of Malaysia.' It must, by literal construction of the provision, logically follow that the detainee has already done some harm to the security of Malaysia. Despite that heavy burden imposed by the requirements of s 73(1), full satisfaction of them will make that arrest and detention beyond reproach.

Under the scheme of sub-s (3) of s 73, any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under s 8, subject to certain conditions. The conditions will be that:

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

The above preconditions on the other hand, on its face, are seemingly silent as to whether that Inspector, Assistant Superintendent, Deputy Superintendent, designated officer or Inspector-General ('the respective extending senior officers') must likewise be in possession of those reasons as provided for under s 73(1)(a) and (b) before authorizing the extensions. To mechanically extend the detention periods provided for by their respective powers, without applying their minds would certainly militate against the tenets of habeas corpus law. The obvious stepping up and involvement of an increasing number of senior officers in the exercise must surely mean that the factors of application of mind, check and balance, and supervision cannot be discounted. Furthermore, the opening words of 'may be detained' rather than 'shall be detained' under s 73(3), fortifies my view that it endows the relevant officers with discretion, which requires the application of the mind, whether to authorize the extension or otherwise. If a Minister of Home Affairs were not permitted to nonchalantly sign a detention order without more, surely too that spirit and argument must apply equally to the matter under discussion. Having considered all those

factors, I am fully convinced that it is statutorily essential that those officers be subject, to the requirements of s 73(1). A

An intense scrutiny of s 73(1) will reveal that Parliament had consciously differentiated the relevant personnel to 'any police officer' and the respective extending senior officers, with the former to include a reserve officer, an auxiliary police officer and a police officer appointed in accordance with any written law for the time being in force (s 2 of the Act). That being so, a police personnel below the rank of Inspector (for easy reference hereinafter to be referred as the *lesser officer*), as long as he falls within the ambit of the definition of a police officer, may also without warrant arrest and detain any person under s 73(1). The fact that the authority of the immediate respective extending senior officer, within the context of the relevant provision, is required for further detention, must surely mean that the effect of the detention undertaken by that lesser officer or the arresting officer is about to lapse. That construction is undisputable as unless the respective extending senior officer extends the detention period, that the detainee is free to walk away unimpeded. It goes without saying that the authorized extension must be obtained before the expiry of the running detention period, as otherwise in the event of a break however slight, the resultant continued detention would contravene s 73(3) of the Act. B C D

With the lesser officer or arresting officer playing no more roles in the enquiry unless a lease of life were to be authorized by the respective extending senior officer, purposefully to abridge and legitimize the detention pending enquiries, any extension without satisfying the prerequisites of s 73(1)(a) and (b) would be a mindless act. Unless that extending officer has applied his mind, how then is he to appreciate that the requirement of his authority was made in respect of a s 8 matter as promulgated in crystal clear terms by the Act. It must be emphasized that when authorizing that extension, his prime consideration has to be the eventual justification of a detention of the detainee under s 8, and for no other purpose. E F

But is there any other form of detention or purpose under s 73? The answer is in the affirmative. A scrutiny of s 73 will highlight that apart from s 73(1), where a police officer may without warrant arrest and detain a person pending enquiries pursuant to the reasons provided therein, under s 73(2) a police officer may act likewise, but for a totally different reason. Under s 73(2) that arrest and detention may be undertaken pending enquiries of any person, who upon being questioned fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. Clearly these two sub-sections have been promulgated for different purposes, and subject to different treatments. The detention of a person for a period not exceeding sixty days under s 73(3) clearly does not apply to a s 73(2) detention pending enquiries, as the former provision in succinct terms provides that any arrested person 'may be detained for a period not G H I

exceeding sixty days without an order of detention having been made in respect of him under s 8.' The reference and delineation to s 8 is only found in s 73(1).

To convince me that the respective extending senior officer did apply his mind, some evidence without fail must be made available for my perusal and consideration. As the matter before me is affidavit-based, the source of that evidence if any, must surely be the very affidavits supplied by the respondents. For this we have to be thankful to s 366 of the Criminal Procedure Code, which is an enactment of the English practice. I begin with encl 12, ie the affidavit affirmed by one Inspector Razali a/l Selvaraju, and the relevant portion reads:

> 3 Pada 18 April 2002 jam 10.45 malam saya telah memberi kuasa penahanan ke atas orang tahanan bernama Nasharuddin bin Nasir (No KP 571125–05–5195 (selepas ini disebut sebagai 'Pemohon') dilanjutkan melebihi 24 jam lagi mulai 18 April 2002 jam 11.55 malam, suatu kuasa yang diberikan kepada saya di bawah peruntukan s 73(3) Akta Keselamatan Dalam Negeri 1960 kerana saya berpuas hati bahawa siasatan yang diperlukan di bawah s 73 Akta yang sama tidak dapat di sempurnakan dan perlu diteruskan.
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> (*Translation* — On 18 April 2002 at about 10.45pm, I had granted the authority of detention on one Nasharuddin bin Nasir (KP 571125–05–5195) (hereinafter referred to as the 'Applicant') to be extended for more than 24 hours effective 18 April 2002 at 11.55pm, pursuant to the powers given to me under s 73(3) of the Internal Security Act 1960 as I was satisfied that the investigation required under s 73 could not be concluded and must be continued.)

A perusal of the above paragraph, or for that matter the full text of encl 12, satisfied me for starters that no mention of the requirements of s 73(1)(a) and (b) of the Act was made when authorizing the extension. With the exception of the dates and time, encls 9 and 11, which were affirmed by Acting Deputy Superintendent of Police, Yusof bin Mohd Amin and Assistant Superintendent, Mok Kai Mung, and attested in similar fashion to encl 12, had also failed to attest those requirements. These two officers, together with Inspector Razali merely said that the extensions were granted, as investigations were still required under s 73 (see eg, encl 12 exh RS-1).

With reference to the last remark, surely the grounds adverted to by them for the extensions, went outside the scope or beyond the ambit of s 73(3). To reiterate and as clarified above:

(a) the applicant was indisputably arrested pursuant to s 73(1), ie with a detention in mind under s 8 of the Act and not of s 73(2) (see encl 10 as per exh CK-1); and

(b) s 73 covers two different types of detention.

On that interpretation, it must be concluded that as the authorization of the extension was granted, on the premise of an investigation still progressing under s 73, either by juxtaposition and or by the wide berth of s 73, s 73(2) must have been included in their consideration. To import unrelated factors when extending that detention order will surely prejudice the interest of the

detainee. It could certainly be implied that due to the insufficiency of reasons, unrelated matters necessitated importation by the respondents, to justify the further detention. Lest it be forgotten, the power to authorize any extension was statutorily designed with s 8 in mind, and the inclusion of unrelated matters would certainly be beyond their jurisdictional powers. That being so, with the premises of Inspector Rizal, Assistant Superintendent Mok Kai Mung and Acting Deputy Superintendent of Police Yusof bin Mohd Amin not falling squarely within the scope of s 73(3) of the Act, their exercise of the authority to extend the detentions were flawed at the outset.

A second major flaw detected is the failure to identify specifically the purpose of the extension. This flaw on its own had also spelt absolute disaster to the legal status of the detention. For purposes of analogy permit me to pluck out the views of the court in *Mohamed Ezam Mohd Noor & Ors v Inspector General of Police* [2001] 2 MLJ 481, where at p 506, Augustine Paul J had opined:

> Pursuant to s 73(1)(b) of the Internal Security Act 1960, the *specific purpose of the detention must be identified.* A setting out in full of the language in s 8(1) of the ISA would be fatal as it would result in the specific purpose of the detention not identified and would also render s 73(1)(b) superfluous. (Emphasis added.)

Even though the language of s 73 was not set out in full in the authorization document, which would have certainly drawn flak, but enough on its own to taint the impugned order, the failure to identify the specific purpose of the extension had exacerbated matters for the respondents. Here, either the officers had mechanically signed the authorization document to extend the detention period pursuant to their powers or an unpardonable mistake but not rectified had been committed. Whichever way one looks at it, the benefit of the doubt must tilt in favour of the applicant, as any detention not in accordance with the law must be struck down (see *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; *Public Prosecutor v Koh Yoke Koon* [1988] 2 MLJ 301; *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171).

Interestingly enough a scrutiny of encl 7, an earlier affidavit signed by the Inspector-General, in succinct terms had capably attested that he had reasons to believe that there were grounds, which would justify the detention under s 8 of the Act. That being so his affidavit on that specific issue was beyond reproach. If the three respective extending senior officers had meant to convey the same message similar to that of their superior, it was beyond me why they likewise could not have produced affidavits that carried the same style and contents for purposes of the extensions. There would have been no flaws if they had merely affirmed that the authority to detain the applicant further was granted as they had reasons to believe that there were grounds that would justify his detention under s 8, and in the next line identify the specific purpose of the detention.

I now would like to broach the third flaw, ie whether the objective test enunciated by the Federal Court in *Mohamed Ezam bin Mohd Noor v Ketua*

Polis Negara had been faithfully adhered to by the arresting officer, when exercising his discretion under s 73(1) of the Act. With regard to this matter, an appreciation of the remarks of Steve Shim CJ (Sabah & Sarawak) at p 479 of the above case would not be out of place. His Lordship had enunciated that:

> Given the reasons stated above, I take the view that as the arrest and detention by the police officer entail the curtailment of the liberty of a subject involving, as I have said, a basic and fundamental right, his exercise of discretion under s 73(1) is therefore subject to the objective test and thus reviewable by a court of law. The decision of the police is objectively justiciable. This means that the question whether a police officer has the required 'reason to believe' when he makes the arrest and detention in reliance on s 73(1) is objectively justiciable. The burden is on the police officer to satisfy the court that the preconditions constituting the said section which set out the jurisdictional threshold requisite to the exercise of arrest and detention have been complied with.

Returning to the mainstream, whether there was compliance or otherwise by the arresting officer, by necessity a perusal of his affidavit is imperative, ie encl 10. The relevant portion for my consideration reads as follows:

> 4 Saya dengan sesungguhnya menyatakan daripada maklumat yang di terima berhubung dengan kegiatan orang tahanan bernama Nasharuddin bin Nasir No KP 571125–05–5195 (selepas ini di sebut sebagai 'Pemohon'), saya mempunyai sebab untuk mempercayai bahawa terdapat alasan-alasan yang akan menjustifikasikan penahanan Pemohon di bawah s 8 Akta Keselamatan Dalam Negeri 1960 (Akta 82).
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> 5 Saya juga sesungguhnya mempunyai sebab untuk mempercayai Pemohon telah bertindak mengikut apa-apa cara yang memudaratkan keselamatan Malaysia.
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> (*Translation* —
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> 4 I verily say from information received pertaining to the activities of the detainee called Nasharuddin bin Nasir IC No 571125–05–5195 (hereinafter referred to as the 'Applicant'), I have reasons to believe that there are reasons to justify his detention under s 8 of the Internal Security Act 1960 (Act 82).
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> 5 I verily have reasons to believe that the applicant had acted in ways that are prejudicial to the security of Malaysia).

A reading of CK 3, which is a police report filed by the above arresting officer, one ASP Chang Kew, will likewise reveal that not only did it not detract from the language of the above affidavit in any material way, but was also devoid of material particulars. To be satisfied with mere assertions would imply submission to the archaic subjective test. To be fair to the respondents the above para 4 of the affidavit, did sufficiently satisfy the requirements of s 73(1)(a), but certainly not sub-s (1)(b). Without any particulars disclosed indicating that the applicant had acted or about to act or was likely to act in any manner prejudicial to the security of Malaysia etc, I could only conclude that the respondents had not discharged the requirements of the latter subsection. With the failure of the respondents to evidentially prove that the objective test had been applied, I thus must

conclude that the respondents have fallen short of the current legal requirement. This third ground on its own would also have been sufficient to tarnish the legal status of the detention beyond redemption.

To allege that they were prevented from disclosing certain particulars due to the inhibitive provision of s 16 is an argument that will fall flat, and similarly outdated. To appreciate the matter under discussion better, I herewith reproduce the latter provision. It reads:

> Nothing in this Chapter or any rules made thereunder shall require the Minister or any member of the Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

The Federal Court in *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara*, in ringing terms had expressed that the provisions of s 16 of the Act are expressly applicable only in relation to Chapter II, Part II of the Act. As s 73 falls under Part IV, s 16 thus will be inapplicable.

With some not too careful officer having blemished the substantive procedural aspect of the detention exercise, it goes without saying that the eventual order issued by the Minister, must similarly be tainted (see *Nik Adli bin Nik Abdul Aziz v Ketua Polis Negara* [2001] 4 MLJ 598). If the roots are bad, surely the fruits too will be bad. Some say that if the roots are bad, there will be no trees, let alone fruits.

Based on any one of the above three major reasons, I have no hesitation in granting the habeas corpus order.

Application allowed.

Reported by Peter Ling